Sills Cummis & Gross P.C.

# Client Alert **Employment & Labor**

## *Breaking Developments from the EEOC and the U.S. Department of Labor*

The U.S. Department of Labor ("DOL") and the U.S. Equal Opportunity Commission ("EEOC") have finalized highly anticipated rules and regulations that impact employers in the areas of overtime pay and wellness programs. While they are not effective until the end of the year and beginning of next year, employers should start assessing their current policies and practices given the magnitude of the new rules and regulations.

### New Federal Regulations Dramatically Increase Employee Eligibility for Overtime Pay

On May 18, 2016, the DOL issued its long-anticipated amendments to certain exemptions from the overtime requirements of the Fair Labor Standards Act ("FLSA"), which will dramatically increase the number of employees eligible for overtime pay to over 4 million workers within the first year of implementation. The amendments will be effective on December 1, 2016.

The new regulations nearly double the minimum salary threshold required under federal law for exempt employees falling under the executive, administrative, or professional exemption, increasing from $455 per week or $23,660 per year, to $913 per week or $47,476 per year. Employees who do not meet the amended salary requirements when the final regulations become effective will no longer qualify for exempt status,

which means that they will be eligible for overtime pay if they work over 40 hours in a workweek. As a result, wages are expected to increase by $12 billion over the next 10 years.

The following is a summary of key provisions of the final regulations:

- Sets the minimum salary threshold at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region to $913 per week and $47,476 annually;
- Increases the total annual compensation requirement for highly compensated employees, subject to a minimal duties test, to the annual equivalent of the 90th percentile of full-time salaried workers from $100,000 to $134,004;
- Creates a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above-mentioned percentiles; and
- For the first time, amends the salary basis test to permit employers to use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10 percent of the new standard salary level, so long as those payments are made on a quarterly or more frequent basis.

These controversial rules originate from a memorandum issued by President Barack Obama on March 2014 that directed U.S. Labor Secretary Thomas Perez to "modernize and streamline" the regulations governing the FLSA's exemptions from minimum wage and overtime pay requirements.

## EEOC Finalizes Rules on Employer Wellness Programs

The EEOC issued two final rules on May 16, 2016 governing employer-sponsored wellness programs under the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Many employers provide wellness programs to their employees in an effort to facilitate healthy lifestyles. Such programs may include medical questionnaires or health risk assessments. The finalized rules are designed to provide employers with incentives for implementing these programs, while simultaneously offering protection to employees against discrimination. They also provide direction on ensuring compliance with the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act (ACA).

The ADA and GINA protect confidentiality and privacy and generally prohibit employers from obtaining medical information from employees and job applicants. However, these laws also permit employers to utilize health questionnaires as part of wellness programs so long as participation is voluntary. The EEOC wellness rules change previous regulations to allow employers to provide incentives to employees so long as the information is not used for discriminatory purposes. The final ADA rule provides that employers may offer incentives of up to 30 percent of the total cost of self-only coverage under a group health plan to encourage an employee's participation, which must be voluntary, in a wellness program that includes disability-related inquiries and/or medical examinations. The new rule differs from the maximum allowable incentive available under HIPAA, which is 30 percent of the total cost of coverage under a plan in which the employee and any dependents are enrolled. The text of the rule is available at: https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act.

The final GINA rule specifies that the maximum incentive for a spouse's participation in a wellness program cannot exceed 30 percent of the cost of self-only coverage, which includes both the employee's and employer's contribution. This constitutes the same incentive allowed for the employee. The rule prohibits employers from offering incentives for information about employees' children or for certain genetic information. The text of the rule is available at: https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act.

The rules also add provisions concerning confidentiality. Employers may only receive aggregated health information collected in connection with a wellness program that is not reasonably likely to disclose an individual's identity. Additionally, employers may not condition any incentive on an employee's agreement to the sale or disclosure of his or her medical information. The final rules apply prospectively to employer wellness programs as of the first day of the first plan year that begins on or after January 1, 2017.

## Employer Tips

Employers should take note that, following the effective date of the regulations, the DOL as well as state departments of labor are likely to increase audit activity to ensure compliance. Employers should be prepared to reclassify employees as non-exempt pursuant to the regulations. They should also examine workers who are currently classified as independent contractors to determine whether they should be reclassified

as employees or whether their duties should be restructured. Employees newly classified under the regulations may be eligible for overtime pay. To manage overtime expenses, employers may consider establishing strict guidelines concerning working over 40 hours in a workweek or may elect to hire additional employees to spread the workload.

Employers should also analyze their wellness programs to determine if they are in a group health plan. Wellness programs can be included in an employer's "wrap plan," and therefore, comply with many ERISA and ACA requirements. Employers implementing wellness programs should ensure that any health questionnaire is reasonably designed to promote health or prevent disease. Not all inquiries will be deemed lawful. As such, employers should assess whether information sought from their employees is overly intrusive.

The following attorneys in our Employment and Labor Law Practice Group can assist employers in navigating the new rules and regulations in order to interpret and comply with its provisions.

**David I. Rosen, Esq.**
Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

**Galit Kierkut, Esq.**
Client Alert Editor; Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

**Charles H. Kaplan, Esq.**
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563

**A. Sonu Ray, Esq.**
Client Alert Author; Associate, Employment and Labor Practice Group
sray@sillscummis.com | (973) 643-7000